

April 26, 2012

**MICHIGAN HOUSE OF REPRESENTATIVES
Judiciary Committee**

S.B. 320

TESTIMONY OF DONALD N. DUQUETTE IN SUPPORT

Good morning. Thank you very much for taking up this bill. I am Clinical Professor of Law at the University of Michigan Law School where I direct the Child Advocacy Law Clinic. I represented Chris Ratte and his wife in the episode they described.

Child welfare law is my specialty. Our Child Advocacy Law Clinic, started in 1976, is the oldest such law school clinic in America. Student attorneys under the close supervision of clinical faculty represent children, parents and the county prosecutor's office in separate Michigan counties within driving distance of Ann Arbor. We think this representation of the various parties in these difficult child welfare cases give us some additional objectivity in addressing the policy issues. We are not ideological advocates for one side or another. We just want to see a well-functioning system that will best serve children and their families.

To the credit of the child welfare leadership of Michigan, most were seriously embarrassed by this case and recognize that our child protection system is plagued by poor decision-making, resulting in both over and under-intervention in families. This is one of the reasons Michigan has so many children in foster care.

In December 2009, the State Court Administrative Office convened a study group to address this question and over the course of several months developed a proposal for legislation to correct these short-comings in Michigan law. I applaud the leadership of the Supreme Court and the SCAO in organizing this conversation. The major Michigan child welfare stakeholders participated in the SCAO process -- DHS, judges and referees, court administrators, law enforcement, the Ombudsman, law professors from several law schools, and independent child advocacy groups. At the end of the process in April 2009, all supported the legislative proposal you have before you in SB 320. I think we have a consensus recommendation to you. I have not heard of any opposition up to now.

SB 320 provides for technical procedures governing removing a child from parental custody where the child is reported to be abused or neglected. There is a complicated dance at this stage of our child welfare process among the police, the child protection caseworkers of DHS, the courts and the nuclear and extended family of the child. This bill makes the removal and placement process **more thoughtful and deliberate** but is not so rigid as to compromise protecting a child who is really in danger. The bill also brings Michigan law into constitutional compliance.

The current Michigan statute does not meet minimum U.S. constitutional standards as defined by several of the U.S. Circuit Courts of Appeal. No state in the nation has a lower threshold for removal of children into foster care than does Michigan. The constitutional standard for emergency and *ex parte* removal as set by the various Federal Courts of Appeal is that there be “exigent circumstances” or that the child be in imminent danger or immediately threatened with harm. SB 320 would bring Michigan into constitutional compliance.

A 2004 Federal District Court case that originated in Lansing, *O'Donnell v. Brown*, found that reliance on verbal orders to remove children was unconstitutional. The current procedures are legally insufficient.

Leo Ratte and his family do not represent the typical family involved in Michigan's child protection system. Most child welfare families are poor and as you know, disproportionately people of color. What happened to Leo and his Mom and Dad happens to many other families in our state too. This fix will be for them. This is also an issue that transcends the usual Republican/Democrat and liberal/conservative divide.

SB 320's fix has four parts: 1) Standard for Emergency Police Removals; 2) Process for Judicial Officer Review of Emergency Placement; 3) Standard for *Ex Parte* Court-ordered Emergency Removals; and 4) Preliminary Hearing Pretrial Placement Standards.

I am going to speak to the provisions in the bill in this order, the step by step order in which a case would come to the attention of the authorities. This is not the order presented in the bill.

1. Police Removal

Police removal is the first item. The Standard for Emergency Removals is in §14A(1) & (2) on page 13 and includes this important test: “...*If there is reasonable cause to believe that a child is suffering from serious harm or is in surroundings that present a serious risk of harm and the child's immediate removal is necessary to protect the child's health and safety....*” The officer may take a child into protective custody. If the officer takes the child into protective custody the officer or the DHS is to immediately contact the court to seek a court order for placement pending the preliminary hearing.

2. Judicial Review of Emergency Placement

§14A(3) streamlines the process of judge or referee review. Currently only a judge can enter an order. Under this bill, either the judge or referee may order emergency placement. Limiting this power to judges and not referees overly complicates the process without any benefit to sound decision-making.

3. *Ex parte* Court-ordered Emergency Removals

§14B(1) provides the important substantive test for *ex parte* orders authorizing DHS to place the child pending the Preliminary Hearing. The test for the *ex parte* order is the same as for the law enforcement officer emergency removal – “serious harm or is in surroundings that present a

serious risk of harm and the child's immediate removal is necessary to protect the child's health and safety." The order shall be supported by written findings of fact which further encourages careful fact finding and deliberation and makes the order reviewable.

4. Preliminary Hearing Pretrial Placement Standards

The bill addresses Preliminary Hearing Placement Standards in §13a, pages 7 & 8 of the bill. These five elements were previously a part of Michigan law but, strange as it sounds, seem to have been inadvertently removed during the Binsfeld amendments of 1998. Many believe that this was a drafting error not picked up by the usual safeguards. The previous language worked well and should be reinstated. It requires courts and caseworkers to consider and balance various factors. To order out of home placement the court must find that custody with the parent presents a substantial risk of harm, no provision of service or other arrangement except removal is reasonably available to protect the child from that risk, continuing in the child's residence is contrary to the child's welfare, and reasonable efforts were made to prevent or eliminate the need for removal of the child. Finally, conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.

The current very lax law encourages poor decision-making, does not meet constitutional muster. This imprecision negatively affects many children and their families. I urge you to support SB 320. This bill would be an important improvement to the child protection and foster care process in Michigan by making the decision-making more thoughtful and balanced but without compromising the ability to protect children who are truly at risk.

Thank you.

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